IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO: 79-5267

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SUPREME COURT, U.S.

ANTONIO PEREZ,

Petitioner,

vs.

LOUIE L. WAINWRIGHT,
Secretary, Florida Department Of
Offender Rehabilitation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

RESPONSE IN SUPPORT OF REMAND
TO THE COURT OF APPEALS

Petitioner, by and through undersigned counsel, hereby files his response in support of the vacatur of the judgment of the Court of Appeals for the Fifth Circuit and remand for further consideration in light of this Court's decision in Cuyler v. Sullivan, ___U.S.___ (Case No. 78-1832, May 12, 1980).

1. It is evident that the Court of Appeals rejected petitioner's Sixth Amendment claim solely because it found no state action. See Perez v. Wainwright, 594 F.2d 159, 161-163 (5th Cir. 1979). The Court of Appeals, in holding that the finding of the district court of no state action was not clearly erroneous, specifically concluded:

> Something more is required to constitute state action than the failure of a state official to pick up and follow a scent that might uncover the fault of a privately retained lawyer. Id. at 162 (citation omitted)

2. That petitioner's claim was rejected solely due to a finding of no state action is further demonstrated by the Fifth Circuit's prior grants of belated appeals to state defendants who raised claims of ineffectiveness of retained counsel and established that responsible state officials should have known of counsels' derelictions. See Passmore v. Estelle, 607 F.2d 662 (5th Cir. 1979), cert. denied, ___U.S.___(1980); Cantrell v. Alabama, 546 F.2d 652 (5th Cir. 1977), cert. denied, 431 U.S. 959 (1977).

3. Indeed, this conclusion is further substantiated by the Fifth Circuit's routine grants of belated appeals to the state defendants whose right to appeal was shown to have been thwarted by actions of appointed counsel. See, e.g., Daniels v. State of Alabama, 487 F.2d 987 (5th Cir. 1973); Foxworth v. Wainwright, 449 F.2d 317 (5th Cir. 1971); Rought v. Henderson, 445 F.2d 622 (5th Cir. 1971); Lumpkin v. Smith, 439 F.2d 1084 (5th Cir. 1971).

4. This Court's decision in Cuyler v. Sullivan, supra, (slip op., at 7-9), abolishing the dichotomy previously drawn by the Court of Appeals between retained and appointed counsel and recognizing the existence of state action where retained counsel's ineffectiveness taints the criminal proceedings, therefore controls this case. The Court of Appeals accordingly should be provided the opportunity to reconsider its decision.

Respectfully submitted,

BENNETT H. BRUMMER
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of Florida
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Miami, Florida 33125

BY: Karen M. Gottlieb
KAREN M. GOTTLIEB
Assistant Public Defender

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the response of petitioner was mailed to Anthony C. Musto, Assistant Attorney General, Room 820, 401 Northwest 2nd Avenue, Miami, Florida, 33128, this 4th day of June, 1980.

Respectfully submitted,

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